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IN THE

SUPREME COURT OF THE UNITED STATES

No. 465

ROSE KATZ,
Petitioner,

vs.

IRA G. KATZ,
Respondent.

REPLY TO RESPONDENT'S BRIEF

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We reply to respondent's brief in the order in which his asserted reasons for denying the Writ are set forth therein.

1. Petitioner's acts of cruelty which occurred subsequent to the New York separation decree make moot her contention of res adjudicata.

No acts of cruelty subsequent to the separation in 1954 were alleged in the complaint. This was practically a verbatim copy of the counterclaim originally filed and subsequently withdrawn in the New York proceedings.

Respondent charges that the petitioner had a conversation with the respondent's employee Kessner in August of 1958 and that in this conversation Katz was referred to in obscene language. The alleged conversations between the

petitioner and the employees of Ira G. Katz, Inc., could not possibly have constituted cruelty to Ira G. Katz and such acts are not alleged in the complaint.

Respondent also complains about the fact that petitioner entered the New York apartment of Mr. Katz in December of 1962. How this entry could have constituted extreme cruelty we cannot say.

In *Coleman* v. *Coleman,* 26 So.2d 445 (Fla. 1946), cited by respondent, the wife went to the store where the husband was employed and engaged in heated arguments with him. There is no comparison between the case at bar and the cited one.

In *Berman* v. *Berman,* 103 So.2d 611 (Fla. 1958), also cited by respondent, the Court did not say that the wife "never failed to call the clients of her husband" but mentioned the fact that in support of his charge of cruelty and ungovernable temper, the wife called the attorney of the husband and made disparaging remarks against him to his great embarrassment.

2. The Florida court had jurisdiction of the parties and the subject matter.

There is no contention about this point. It has nothing to do with the question as to the court's improper refusal to accord full faith and credit to the New York judgment.

3. There is no question of compliance with the essential requirements of procedural due process.

This question is not even lurking in the record.

4. The Florida courts correctly held that the law as set forth in *Berman* v. *Berman* is controlling.

This question is not properly presented on the record. The question is not whether the courts properly applied

the law in the Florida case of *Berman* v. *Berman*, but whether the Florida court gave proper recognition to the New York decree in *Katz* v. *Katz*.

This is dealt with under the fifth question.

5. Florida courts are not required to give more weight to the New York separation than are New York courts.

Cited under this heading is *Lynn* v. *Lynn*, 97 N.E.2d 748, 302 N.Y. 193, 28 A.L.R. 2d 1335 (1951); *Macaluso* v. *Macaluso*, 207 N.Y.S. 2d 105 (1960); and *Helman* v. *Helman*, 73 N.Y.S. 2d 32 (1947).

In *Lynn* v. *Lynn*, the question was whether the doctrine of divisible divorce applied in a case where the out of state divorce was granted to the husband ex parte is to be extended to a situation where the wife appeared in the divorce proceedings.

The petitioner-wife and the defendant-husband were separated by a decree of the New York Supreme Court upon finding that the defendant-husband had abandoned the wife without just cause or justification. The decree awarded the wife custody of the parties' child and granted her an allowance subject to modification.

Sometime later the husband filed suit in Nevada on grounds of extreme cruelty. The wife appeared in the action and disputed the claim as to a bona fide domicile and contested the case on the merits. The Court found that the husband was a bona fide resident and that the wife had been guilty of extreme cruelty *subsequent to the date of the New York separation decree*. A divorce was granted but made no provision for the support of the wife and child.

Thereafter the husband returned to New York and married another woman but continued to pay the $85.00

per week called for by the New York decree. He took the benefit of tax deductions in connection with Federal and State income taxes.

In June of 1948 after the above proceedings had taken place, the plaintiff-wife then applied for an increase in the alimony awarded in the New York separation decree contending that the husband's income had increased. The husband opposed on the ground that the Nevada decree had provided that plaintiff had no right to alimony.

The Court appears pretermitted the question of whether the Nevada decree failed to accord full faith and credit to the New York judgment saying (28 A.L.R. 2d 1342):

> "And even if we were to accept the view of the Appellate Division that the Nevada court, in decreeing the divorce, failed to give appropriate effect to the adjudication made in the New York action, the courts of this state would still be required to accord full faith and credit to the Nevada decree. Nevada's asserted denial of full faith does not justify or permit retaliation by any other state. As the decisions make plain, plaintiff's only remedy to correct the alleged error was by direct appeal from the Nevada judgment through the Nevada courts and, if necessary, to the Supreme Court of the United States." . . .

Macaluso v. *Macaluso* is substantially different from the case at bar.

Here the wife in 1953 obtained a judgment of separation from the husband in the Supreme Court of New York. She was awarded permanent alimony. The husband's counterclaim for separation was dismissed on the merits.

In 1955 the husband obtained a Florida decree of divorce from the wife on the grounds of mental and physical cruelty.

In the cited case which was an action for alimony the Florida decree was assailed on the ground that the husband was and always had been a resident of New York. The defendant contended that the Florida decree was entitled to full faith and credit in New York.

In the course of its opinion the Supreme Court said "the New York decree of separation was not res judicata on the question of plaintiff's alleged cruel and inhuman treatment of her husband."

It is obvious from a reading of the case that the Florida decree was entered on constructive service from which it may fairly be inferred that the wife did not appear in the case.

From this the conclusion is apparent that the New York decree of separation was not set up in bar in the Florida suit. Therefore the statement above quoted is obiter.

However the Court said that while it was unable to refer to the notes of the testimony taken in the original separation proceeding that it concluded "that although some acts of cruelty proven before the Master in Florida included specific acts common to the New York counterclaim for separation, additional and separate acts of cruelty were alleged and proven in Florida to the satisfaction of the Master in Florida."

Evidently, these "additional and separate acts" were the only ones considered.

In *Helman* v. *Helman*, the wife instituted an action for separation against her husband in the Supreme Court of New York. He appeared and contested the issue. Judgment was granted in favor of the wife and she was awarded alimony and the custody of the child.

Later the husband went to Nevada where he commenced an action against the wife for divorce. She filed an answer and crossclaim seeking a divorce. The court awarded her a divorce, the custody of the child and alimony, and decreed that the payment of alimony awarded by the Supreme Court of New York was superseded.

The question presented by this petition was not presented in the case of *Helman* v. *Helman* and the case is of no value as an authority.

The complaint in the case at bar charged no acts of cruelty after the entry of the judgment of separation by the Supreme Court of New York in the prior proceedings.

The fact that one or two of the witnesses in the trial of the case may have testified to the incidents referred to in Respondent's brief does not constitute grounds for disregarding the effect of the New York judgment.

As to the particular language which is quoted on page 5 of Respondent's brief, Mrs. Katz has point blank denied using any such language and if the question as to her guilt were properly presented here (which it is not) we have no doubt of the fact that we could show that such was not the case.

The Ben Kessner referred to in Respondent's brief was a long time employee of Respondent and we believe that his length of service in the Respondent's behalf was only exceeded by his mendacity. Such incident had no place in the briefs here and certainly Mrs. Katz could not be charged with extreme cruelty to her husband because she said something about him to one of his employees.

Incidentally, the use of vile and obscene language is a charge which was made against the petitioner in the counterclaim in the New York proceedings. See para-

graphs 6a, 6b and 6d, R. 19, and paragraphs 7, 8, and 10, R. 2 and 3.

Under the applicable decisions of the Supreme Court of New York and the Court of Appeals cited in our petition, the determination by the New York court in the separation proceedings was determinative of Respondent's guilt up to the time of the judgment. The Florida court refused to give such faith and credit to this judgment as it was entitled to in New York. Therefore the prior judgment was denied the full faith and credit to which it was entitled under the Constitution.

The writ should issue and the decree should be quashed with directions to dismiss the complaint.

Respectfully submitted,

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I HEREBY CERTIFY that a copy of the foregoing Reply to Respondent's Brief was mailed to Milton M. Ferrell, 550 Brickell Avenue, Miami, Florida, and to Paul A. Louis and Bertha Claire Lee, Alfred I. DuPont Building, Miami, Florida, Attorneys for Respondent this ..... day of November, 1964.

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THOMAS H. ANDERSON.